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February 22, 2000

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
Room TW-B204
445 12th Street, S.W.
Washington, DC 20554

Re: Establishment of a Class A Television Service
MM Docket No. 00-10;
MM Docket No. 99-292; RM-9260

Dear Ms. Salas:

Transmitted herewith on behalf of The WB Television Network are an original and six (6) copies of its Reply Comments filed in connection with the FCC's *Order and Notice of Proposed Rule Making*, FCC 00-16 (released January 13, 2000), concerning the establishment of a Class A television service.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.

Andrew S. Kersting
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Enclosures
cc (w/ encl.): Certificate of Service (by hand & first-class mail)

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

| | | |
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| In the Matter of | ) | |
| | ) | MM Docket No. 00-10 |
| Establishment of a Class A | ) | MM Docket No. 99-292 |
| Television Service | ) | RM-9260 |

To: The Commission

## REPLY COMMENTS OF THE WB TELEVISION NETWORK

The WB Television Network ("The WB"), by its attorneys, hereby submits these reply comments in connection with the *Order and Notice of Proposed Rulemaking*, FCC 00-16 (released January 13, 2000) ("*NPRM*"), in the above-captioned proceeding. These reply comments are intended to respond to the Comments of the Community Broadcasters Association (the "CBA"), filed in this proceeding on February 10, 2000.[1] In support of these reply comments, the following is stated:

### I. The FCC Should Interpret Section 336(f)(7)(A) to Require Class A Applications to Protect Pending Applications for New Full-Service Television Stations.

Section 336(f)(7)(A) of the Communications Act (the "Act"), as amended by the Community Broadcasters Protection Act of 1999 (the "CBPA"),[2] provides that the FCC may not grant a Class

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[1] These reply comments address only one of the proposals set forth in the CBA's Comments. The WB's decision not to address the CBA's other proposals should not be construed as acquiescence, but, rather, The WB believes that the remaining matters have been adequately addressed in the Comments of the WB Television Network ("The WB's Comments"), filed February 10, 2000.

[2] Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified at* 47 (continued...)

A license unless the applicant demonstrates, *inter alia*, that the proposed Class A station will not cause interference to the predicted Grade B contour "of any television station transmitting in analog format . . . ."[3] Rather than apply a literal interpretation to the statutory language, the Commission proposed to require Class A stations to protect authorized full-service stations (*i.e.*, full-power stations which hold either a license or a construction permit), regardless of whether the full-power station has been constructed or is actually "transmitting" in analog format. *NPRM*, ¶27.

Like the FCC, the CBA also proposed not to apply a literal interpretation to the phrase "transmitting in analog format." In its comments, the CBA proposed an even more relaxed interpretation of the statutory language, and would require Class A applications to protect certain pending applications for full-service stations:

> CBA does not believe that it was the intent of Congress to disrupt any proceedings already cut off as of that date for full power analog construction permits, whether through auctions, settlements, or cut-off singleton applications. Accordingly, Class A stations may be displaced only by existing analog stations and full power applicants that have completed all processing short of grant. This category includes post-auction applications, applications proposed for grant in pending settlements, and any singleton applications that are cut off from further filings.

CBA Comments, p. 9.

The CBA's proposed interpretation of Section 336(f)(7)(A) of the Act is significant because it demonstrates that, despite the Commission's proposal, even the trade association which

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[2](...continued)
U.S.C. §336(f).

[3] 47 U.S.C. §336(f)(7)(A). In the *NPRM*, the FCC asked for comments on how it should interpret the phrase, "transmitting in analog format." *NPRM*, ¶27.

"spearheaded the legislative effort to secure passage of the CBPA"[4] believes that certain pending NTSC applications are entitled to protection from Class A applications. The CBA properly recognizes that Congress, in enacting the CBPA, never intended to disrupt the Commission's existing regulatory scheme by giving Class A LPTV applications priority over certain applications for full-power stations which have been pending before the Commission for some time and are merely awaiting a grant.

As the FCC's and the CBA's proposed interpretations of Section 336(f)(7)(A) make clear, Congress' use of the four-word phrase, "transmitting in analog format", is ambiguous. As noted in The WB's Comments, LPTV stations have always received protection that is secondary to that afforded to full-service television stations.[5] Thus, under the rules of statutory construction, if Congress intended to upset the Commission's longstanding regulatory scheme by giving LPTV stations a priority over full-power television stations, it was required to do so through clear and unmistakable language.[6]

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[4] CBA Comments, p. 1, n.2.

[5] *See* The WB's Comments, p. 13, citing *Low Power Television and Television Translator Service*, MM Docket No. 86-286, 1986 FCC LEXIS 3075, ¶18 (1986) (Notice of Proposed Rulemaking) ("Television translators have always been considered secondary to full service television stations in spectrum priority. This secondary status was continued when the low power television service was instituted.").

[6] *See U.S. v. Singleton*, 165 F.2d 1297, 1302 (10th Cir. 1999) ("in light of the longstanding practice . . . we must presume [that] if Congress had intended . . . [to] overturn this ingrained aspect of American legal culture, it would have done so in *clear, unmistakable and unarguable language*") (emphasis added), *cert. denied*, 119 S. Ct. 2371 (1999); *Estate of Wood v. IRS*, 909 F.2d 1155, 1160 (8th Cir. 1990) (Congress is presumed to act with knowledge of existing law, and, "absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction"), quoting *Johnson v. First National Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir. 1983), *cert. denied*,

(continued...)

In light of the ambiguous statutory language, and Congress' failure to express a clear legislative intent to give Class A LPTV applications priority over applications for new full-power stations, there is no basis to require pending NTSC applications to protect subsequently-filed Class A applications. Although the CBA proposes to require Class A applications to protect only those pending NTSC applications which have been processed and are awaiting a Commission grant, many of the NTSC applications pending before the FCC were filed long before those of the winning auction bidders and those which are the subject of a pending settlement proposal. Moreover, a substantial number of the pending NTSC "freeze-waiver"[7] applications were filed before many of the potential Class A LPTV stations obtained their existing authorization. Thus, there is no basis in either fact or law for requiring Class A applications to protect certain pending NTSC applications but not others. This is especially true with respect to those pending NTSC applications which propose a first local service. As demonstrated in The WB's Comments, both the FCC's and the CBA's proposed interpretation of Section 336(f)(7)(A) would be inconsistent with the well-established objectives of Section 307(b) of the Act because requiring pending NTSC applications to protect Class A applications potentially would deprive many communities of their first local television service.[8] Therefore, in interpreting Section 336(f)(7)(A) of the Act, the Commission

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[6](...continued)
465 U.S. 1012 (1984).

[7] *See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, 1987 FCC LEXIS 3477 (July 17, 1987), 52 Fed.Reg. 28346 (1987) ("*Freeze Order*"), in which the Commission ordered a freeze on new analog TV allotments which temporarily fixed the Television Table of Allotments for 30 designated television markets and their surrounding areas.

[8] As stated in The WB's Comments (p. 16), of the 41 WB-related NTSC proposals which (continued...)

should require Class A applications to protect all pending NTSC proposals, including both applications and allotment rulemaking petitions for new NTSC stations.

## II. The FCC's and the CBA's Proposed Interpretations of Section 336(f)(7)(A) of the Act Would Violate the First Amendment to the U.S. Constitution.

In enacting the CBPA and making a Class A license available to qualifying LPTV stations, Congress made the explicit finding that it would serve "the public interest to promote diversity in television programming such as that currently provided by low-power television stations to foreign-language communities."[9] Thus, Congress awarded primary service status to qualifying LPTV stations based in large part on the nature of the programming that some LPTV stations currently are providing to their respective communities.

It is beyond dispute that television broadcasters engage in and transmit speech, and, therefore, are entitled to the protections of the First Amendment. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2464 (1994) ("*Turner I*") ("[O]ur cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

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[8](...continued)
have been pending before the Commission since July 1996, 32 of them propose to bring a first local television service to the designated community.

[9] Section 5008(b)(5) of Pub. L. No. 106-113, 113 Stat. 1501 (1999). Congress found that approximately two-thirds of all LPTV stations serve rural communities. Congress also found that those LPTV stations serving urban markets typically provide niche programming (*i.e.*, bilingual or non-English programming) to underserved communities in large cities. *See* 145 Cong. Rec. S14724 (November 17, 1999).

The FCC's longstanding rules regarding interference between full-service television stations and LPTV and TV translator stations are content-neutral because they have been applied equally to all stations within the same class, irrespective of the content and/or nature of the stations' programming. However, if the FCC's and/or the CBA's proposed interpretation of Section 336(f)(7)(A) of the Act were to be adopted, the Commission's implementation of the CBPA would effectively give Class A LPTV applications a preference over earlier-filed applications for new full-power television stations. Because this preference for Class A applications would be based in large part on Congress' explicit finding concerning the nature of the programming provided by some LPTV stations, it would constitute a content-based regulation that could not be reconciled with basic First Amendment principles. In essence, the Commission's (and the CBA's) proposed interpretation of Section 336(f)(7)(A) would effectively make bilingual or foreign-language programming -- which apparently is being provided by approximately one-third of all LPTV stations[10] -- a dispositive factor with respect to obtaining a preference for a primary service authorization. The Commission's action therefore would constitute a content-based preference for Class A stations which would be subject to strict scrutiny.

As Justice O'Connor explained in *Turner I* with respect to the 1992 Cable Act:

> [T]he Act distinguishes between commercial television stations and noncommercial educational television stations, giving special benefits to the latter . . . . Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make references to content. They may not reflect hostility to particular points of view, or desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications.

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[10] *See* 145 Cong. Rec. S14724 (November 17, 1999).

*Turner I*, 114 S. Ct. at 2476-77 (concurring in part and dissenting in part) (citations omitted).

The majority in *Turner I* held that the cable "must-carry" rules are unrelated to content because the scheme does not distinguish between commercial and noncommercial television stations. The Court observed that:

> The rules benefit all full power broadcasters who request carriage -- be they commercial or non-commercial, independent or network-affiliated, *English or Spanish language, religious or secular*. The aggregate effect of the rules is thus to make every full power commercial and non-commercial broadcaster eligible for must-carry, provided only that the broadcaster operates within the same television market as a cable system.

114 S. Ct. at 2460 (emphasis added). The Court's holding in *Turner I* also made clear, however, that any regulatory scheme that draws distinctions between broadcasters on the basis of the content of their programming (*e.g.*, English versus bilingual or foreign-language programming), awarding a preference to one over another, necessarily would be content-based and would be subject to strict scrutiny.

When applying First Amendment principles to the CBPA, it is clear that if the FCC fails to protect pending NTSC applications from subsequently-filed Class A applications, the Commission's interpretation of Section 336(f)(7)(A) of the Act would result in a content-based preference for Class A applications because they would be given a priority over previously-filed applications for new, primary service NTSC stations.[11] As demonstrated above, the First Amendment does more than

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[11] The WB recognizes that the FCC lacks jurisdiction to declare a statute unconstitutional. Nevertheless, it is not improper for the Commission to be influenced by constitutional considerations in interpreting or applying a statute. *See Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987), citing *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361 (1974); *Public Utils. Commission v. United States*, 355 U.S. 534 (1958). *Cf. Open Media Corp.*, 8 FCC Rcd 4070, 4071 (1993) (FCC described its "policy of refusing to base waivers of rules designed to prevent interference upon non-technical considerations such as

(continued...)

merely prohibit the government from intentionally suppressing speech that it does not like. It also prohibits the government from giving certain types of speech a preference over others because it thinks the speech is especially valuable.[12] Therefore, the Commission cannot, consistent with the First Amendment, give Class A applications a preference over previously-filed applications for new NTSC stations unless the FCC can establish that the award of such a benefit satisfies strict scrutiny analysis. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (a content-based regulation is unconstitutional unless it is narrowly-tailored to serve a compelling governmental interest).

In this case, Congress made no effort to show that the establishment of a Class A service would serve a compelling governmental interest, or that awarding Class A applications a preference over earlier-filed applications for new NTSC stations is narrowly-tailored to serve a compelling governmental interest. Thus, in order for the Commission's (and the CBA's) proposed interpretation of Section 336(f)(7)(A) to pass constitutional muster, the Commission must find that every Class A station will promote diversity in television programming by airing bilingual or foreign-language programming, and that such programming has greater public interest value than the programming that otherwise would be provided by new full-power NTSC stations.[13] The Commission's inherent

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[11](...continued)
ownership or programming.").

[12] *See Turner I*, 114 S. Ct. at 2477 (O'Connor, J., concurring in part and dissenting in part); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232-32 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-15 (1981) (plurality); *Carey v. Brown*, 447 U.S. 455, 466-68 (1980).

[13] Congress recognized that LPTV stations are not satisfactory substitutes for full-power stations and have substantially smaller coverage areas. Congress further found that "[l]ow-power television plays a valuable, *albeit modest role* [in the video programming] market . . . ." *See* Cong. Rec. S14724 (November 17, 1999) (emphasis added).

inability to make such a finding demonstrates the constitutional infirmity of its and the CBA's proposed interpretation of Section 336(f)(7)(A) of the Act. The FCC simply cannot single out pending applications for new NTSC stations for disparate treatment when the alleged governmental interest -- promoting diversity in television programming by attempting to preserve the bilingual or foreign-language programming provided by a select few LPTV stations -- is not compelling. Moreover, the means by which the Commission would elect to achieve that governmental interest -- awarding Class A applications a preference over earlier-filed NTSC applications -- is not narrowly-tailored to serve that interest. Indeed, the Commission's proposal fails to recognize that some of the full-service stations proposed in the pending NTSC applications and allotment rulemaking petitions also may contribute to diversity in television programming by airing their own bilingual or foreign-language programming. Therefore, in order to avoid having its implementation of Section 336(f)(7)(A) of the Act run afoul of the First Amendment, the Commission should interpret that statutory provision consistent with its longstanding regulatory scheme and require Class A applications to protect pending NTSC applications.

## III. Technical Considerations.

In the unlikely event that the Commission elects to require pending NTSC applications to protect Class A applications, the Commission should apply the UHF "taboos" which are contained in Part 74 of the rules, and not those in Part 73. The Commission also should apply only those "taboos" in Section 74.705 of its rules which are absolutely necessary to protect Class A stations. Moreover, due to the substantial public interest benefits that would result from many of the pending NTSC proposals, including first local television services, the Commission should permit pending

NTSC proponents (both applicants and rulemaking petitioners) to accept interference from Class A stations.

Furthermore, because the window filing period for amendments to pending NTSC proposals is scheduled to close on March 17, 2000,[14] prior to the statutory filing deadline for Class A applications, pending NTSC proponents should be give an opportunity to amend their respective proposals in the event it is later determined that their pending NTSC application and/or rulemaking proposal is in conflict with a subsequently-filed Class A application. Indeed, it would be grossly inequitable and an abuse of the Commission's discretion to dismiss an application for a new NTSC station which has been pending at the Commission for several years because of a relatively minor technical conflict with a subsequently-filed Class A application, which easily could be resolved through a routine engineering amendment. This is especially true considering that the *NPRM* did not even address which, if any, of the UHF "taboos" might be applied in connection with Class A applications.

## IV. Conclusion.

For the reasons stated above as well as those in The WB's Comments, The WB requests that the Commission interpret Section 336(f)(7)(A) of the Act to require Class A applications to protect pending applications and allotment rulemaking petitions for new NTSC stations, all of which were filed with the Commission years before any Class A application. In the unlikely event that the Commission chooses not to afford NTSC proponents such protection, The WB requests that the

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[14] *See Public Notice*, DA 99-2605 (released November 22, 1999) ("Mass Media Bureau Announces Window Filing Opportunity For Certain Pending Applications and Allotment Petitions for New Analog TV Stations").

Commission adopt the proposals set forth in Section III herein as well as those in its previously-filed Comments.

Respectfully submitted,

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February 22, 2000

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## CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 22nd day of February, 2000, copies of the foregoing "Reply Comments of The WB Television Network" were hand delivered or mailed first-class, postage prepaid, to the following:

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